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612461—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 491

EDWARD J. GAY PLANTING & MFG. CO., LTD., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court entered memorandum findings of fact and an opinion which are not reported but appear at R. 35–40. The opinion of the Circuit Court of Appeals (R. 57–59) is reported at 143 F. 2d 452.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 23, 1944 (R. 60). The petition for a writ of certiorari was filed on September 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer failed to establish that it bore the burden of any part of the processing tax paid by it, as required by Section 902 of the Revenue Act of 1936 in order to secure a refund.

STATUTE INVOLVED

The pertinent statute is set forth in the Appendix, *infra,* pp. 10–16.

STATEMENT

This proceeding was instituted in the Processing Tax Board of Review [1] upon the disallowance by the Commissioner of the taxpayer's claim, filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes paid under the provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, in the amount of $27,419.30 (R. 4–9).

The parties filed a joint stipulation of facts before the Processing Tax Board (R. 48–53). The case was submitted to the Tax Court on the stipulation, which was the only evidence presented, and on the record otherwise made before the Processing Tax Board (R. 3). The Tax Court made its findings of fact on the basis of the stipulation, and held that the taxpayer had failed to prove that it was entitled to a refund of any part of the amount involved (R. 35–40).

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[1] The Processing Tax Board of Review was abolished, effective as of the close of business on December 31, 1942, and its jurisdiction transferred to the Tax Court of the United States, by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

So far as they are here pertinent, the facts so stipulated and found are as follows (R. 35–38):

The taxpayer was a grower of sugar cane, a purchaser of sugar cane, and a producer of direct consumption sugar. It paid processing taxes in the sum of $27,419.30 on the processing of sugar cane pursuant to the Agricultural Adjustment Act, as amended. It filed a timely claim, under Title VII of the Revenue Act of 1936, for the refund of the entire amount of processing taxes paid, which claim was disallowed in full by the Commissioner of Internal Revenue. The taxpayer filed a petition for review with the United States Processing Tax Board of Review. (R. 35–36.)

This claim for refund, as filed and as disallowed by the Commissioner, disclosed a tax period margin of $0.01626685 per unit of commodity processed and a margin for the period before and after the tax of $0.00939057 per unit of commodity processed, or an excess margin during the tax period of $0.00687628 per unit (R. 36). The tax period of the taxpayer was the period commencing June 8, 1934, and ending November 30, 1935 (R. 38).

The taxpayer produced plantation granulated sugar and first molasses for direct consumption by the sulphitation process. It also produced blackstrap molasses, as a byproduct. (R. 36.) The taxpayer processed sugar cane which it grew on its own plantation and sugar cane which it pur-

chased in the open market from other planters. The books and records of the taxpayer were departmentalized, segregating its agricultural operations (the production of sugar cane) from its factory operations (the conversion of own-grown cane and purchased cane into sugar products). Cane purchased from other planters was charged to its factory operations at the actual cost of such purchases delivered to the factory, which was the same as the current market price at the time of processing of cane of like grade and quality in the markets where the taxpayer customarily made its purchases. The cane grown on its own plantation by the taxpayer was charged to its factory operations at the current market price of sugar cane of like quality and grade. The taxpayer used such charges as entered upon its books for its factory operations in computing the cost of commodity processed during the respective periods in its claim for refund filed as hereinbefore set out. (R. 36–37.)

The sugar cane grown on the taxpayer's plantation is planted during September and October and is harvested during the months of October to December, inclusive, of the following year. In addition to the crop which is harvested 13 or 14 months after planting, there are second and third cuttings in subsequent years from that same planting. Under the taxpayer's method of accounting, all costs incident to the planting and cultivation

of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings. (R. 37.)

The taxpayer at all times sold its granulated sugar at a fixed differential of 35¢ under the prices of the large sugar refiners, all of whom increased their prices by 55¢ per 100 pounds of refined sugar on June 8, 1934, the effective date of the imposition of the processing tax on sugar at the rate of 53½¢ per 100 pounds (R. 36).

The taxpayer billed the processing tax as a separate item on all its invoices covering the sale of tax-paid molasses, the amount of tax so billed being $3,814.90. Two of the taxpayer's customers, in settling for some 57,000 pounds of refined sugar invoiced to them during the month of December 1935, which was sugar on which the taxpayer paid no processing tax, deducted the amount of the tax from the invoice price, and such deductions were allowed by the taxpayer. (R. 37.) After the invalidation of the Agricultural Adjustment Act on January 6, 1936, by the decision of the Supreme Court in *United States* v. *Butler,* 297 U. S. 1, the taxpayer's sales invoices carried one or the other of the following notations (R. 37):

> (a) Buyer to pay processing tax, if any.
>
> (b) Excise, or any other tax applicable to this sugar, for account of the buyer.

The Circuit Court of Appeals held (R. 57–59), as had the Tax Court (R. 38 39), that the tax period margin and the margin for the period before and after the tax, as above stated (p. 3), were properly computed by the taxpayer, and since the margin during the tax period exceeded the margin during the before and after periods, that the taxpayer must be presumed, under Section 907 (a) of the Revenue Act of 1936, to have borne none of the processing tax but to have shifted it to others. The record contains other evidence which, as the Tax Court held (R. 39–40), affirmatively establishes, independently of the statutory presumption, that the burden of the tax was passed on to others, and it contains no evidence to rebut the presumption. The Circuit Court of Appeals affirmed, holding that the Tax Court's decision is supported by substantial evidence (R. 59).

ARGUMENT

If the margin as computed in accordance with Section 907 (b) of the Revenue Act of 1936 (Appendix, *infra,* pp. 11–13) was higher in the tax period than in the periods before and after, that fact is "prima facie evidence" under Section 907 (a) that the processing tax was not borne by the taxpayer, and unless the record shows evidence that the processing tax was borne by the taxpayer, as here it does not, the taxpayer may not recover

a refund of the processing tax paid. The margin found by the Tax Court and relied upon by the Circuit Court of Appeals was higher in the tax period than in the periods before and after. This margin was computed under Section 907 (b) (5) by using the current market price of the sugar-cane processed, although as the parties here agree and the Tax Court and the court below recognized (R. 38–39, 59), actual cost should be used, as prescribed in Section 907 (b) (5) (a), if the actual cost is available and the accounting procedure of the taxpayer is based thereon. *Commissioner* v. *Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5), rehearing denied, 134 F. 2d 858, certiorari granted, 320 U. S. 721, dismissed, 321 U. S. 800.

The taxpayer's sole complaint here (Pet. 3–4) is that the Tax Oourt and the court below refused to accept the plain words of paragraph 11 of the stipulation, which states the cost of commodity processed, "using the cost of growing cane as reflected by the portion of [the taxpayer's] * * * books and records dealing with agricultural operations plus the actual cost of cane purchased * * *" (R. 51). But here the cost of growing cane as reflected by the portions of the books and records dealing with agricultural operations is not the actual cost, for, as stipulated in paragraph 9, sugar cane planted on the taxpayer's plantation in September and October of one year

is harvested in three successive cuttings, one in each succeeding year, and all costs incidental to planting and cultivation of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings (R. 51). The cost computed under this procedure bears no relation to "actual cost" (sec. 907 (b) (5) (a)) unless it is assumed that during the seven years which such a procedure would affect, there was perfect constancy in all factors such as the cost and extent of planting, and the rate of yield therefrom—a theoretical assumption in no way borne out by proof and indeed contrary to common experience.

In thus rejecting the cost stipulated in paragraph 11 on the ground that it does not represent "actual cost," and using instead the current market price (sec. 907 (b) (5) (b)), as in fact the taxpayer itself did in its claim for refund and in the portion of its bookkeeping devoted to its factory operations (R. 48, par. 2; R. 50, par. 7), the courts below plainly did not destroy the conclusive nature of judicial admissions (Pet. 4) but gave full effect to the facts stipulated.

Moreover, although it was unnecessary for the Circuit Court of Appeals to pass on the question, the Tax Court found that other evidence, independent of the presumption, affirmatively established that the burden of the tax was not absorbed by the taxpayer (R. 39–40).

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1944.